No. 16-1220

In The
Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., ET AL.,

Petitioners,

v.

HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL.,

Respondents.

Brief Of Professors Of Conflict Of Laws And Civil Procedure As *Amici Curiae* In Support Of Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of conflict of laws and civil procedure with expertise in the rules governing the determination of foreign law. They have a strong interest in the proper application of these rules by U.S. courts. The *amici curiae* are professors of conflict of laws and civil procedure: George A. Bermann, Walter Gellhorn Professor of Law and Jean Monnet Professor of EU Law at Columbia Law School; Pamela K. Bookman, Assistant Professor of Law at Temple University Beasley School of Law; Andrew Bradt, Assistant Professor of Law at the University of California, Berkeley School of Law; Stephen B. Burbank, David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School; Kevin M. Clermont, Ziff Professor of Law at Cornell Law School; Zachary D. Clopton, Assistant Professor of Law at Cornell Law School; Laura E. Little, Charles Klein Professor of Law and Government at Temple University's Beasley School of Law; Ralf Michaels, Arthur Larson Professor of Law at Duke University School of Law; Kermit Roosevelt, a Professor of Law at the University of Pennsylvania Law School; Louise Ellen Teitz, Distinguished Service Professor of Law at Roger Williams University School of Law, Bristol, Rhode Island; Christopher A. Whytock, Professor of Law at the University of California, Irvine, School of Law. A detailed list of *amici* and their qualifications is provided in the appendix.[1]

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[1] All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in

SUMMARY OF ARGUMENT

The Second Circuit held that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 189 (2d Cir. 2016). This "bound-to-defer" rule is incorrect and unwise.

First, the "bound-to-defer" rule is inconsistent with basic American conflict-of-laws principles governing the determination of foreign law. It is inconsistent with Federal Rule of Civil Procedure 44.1's broad authorization for U.S. courts to "consider any relevant material or source" when determining foreign law. It is inconsistent with the principle that determinations of foreign law should be accurate. And it is inconsistent with the principle of judicial independence in the determination of foreign law.

Second, the "bound-to-defer" rule is inconsistent with foreign and international practice. In most other countries, information about foreign law is not binding on courts. Moreover, the world's two main treaties on the interpretation of foreign law expressly provide that information supplied by

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part, and no person other than *amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

foreign governments in accordance with those treaties is not binding on courts. Simply put, foreign governments do not expect each other's courts to be "bound to defer" to each other's interpretations of foreign law, much less the interpretation of *one executive agency* of a foreign government.

Third, there are important reasons why deference principles should be kept separate from the principles governing the determination of foreign law. The Second Circuit's "bound-to-defer" rule would inappropriately delegate to foreign governments power to influence the application of domestic law—and hence the implementation of domestic policy—in a wide range of cases in which the proper application of U.S. law depends on the determination of foreign law. In addition, international comity does not require U.S. courts to defer to foreign governments in the determination of foreign law. International comity is a traditional rationale for choice-of-law rules that require the application of foreign law as a rule of decision under specified circumstances. But in this case, foreign law is at issue because the application of U.S. law depends on the interpretation of foreign law, *not* because choice-of-law rules require the application of foreign law. Therefore, this case does not implicate the comity rationale for choice-of-law rules. Moreover, the concerns that animate comity doctrines are not the same as those that animate the rules governing the determination of foreign law. The former are concerned with the respect owed between governments, whereas the latter are concerned with ensuring that U.S. courts independently and accurately determine the content

of foreign law. In fact, the "bound-to-defer" rule raises issues that are likely to pose significant comity concerns that the ordinary Rule 44.1 approach avoids. U.S. courts can still address comity concerns—separately from their independent determination of foreign law.

To be sure, U.S. courts should give respectful consideration to a foreign government's statements about its law. But as a matter of law, a foreign government's statements cannot be binding on U.S. courts. Instead, U.S. courts should accurately and independently determine the meaning of foreign law taking into account not only the foreign government's own statements, but also other relevant information about that law. This independent approach is especially important when—as in this U.S. antitrust case and many other cases—the proper application of American law depends on a determination of foreign law.

I. THE SECOND CIRCUIT'S "BOUND-TO-DEFER" RULE IS INCONSISTENT WITH BASIC AMERICAN CONFLICT-OF-LAWS PRINCIPLES.

Federal Rule of Civil Procedure 44.1 authorizes U.S. courts to "consider any relevant material or source" when determining foreign law. The Second Circuit's "bound-to-defer" rule is inconsistent with this broad authorization. The Second Circuit's rule also is inconsistent with the basic American conflict-of-laws principles that U.S. courts should determine foreign law accurately and that they should do so independently.

A. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 44.1.

Rule 44.1 authorizes courts to "consider any relevant material or source" when determining foreign law. Fed. R. Civ. P. 44.1. Relevant material may include primary sources (such as constitutions, statutes, regulations, and court decisions), secondary materials (such as treatises and other books, legal periodicals, and other legal commentary on foreign law), and expert advice (such as expert opinions of lawyers, judges, and scholars). *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.).

The text of Rule 44.1 places no limitations on this broad authorization. Moreover, the official advisory notes to Rule 44.1 do not indicate that any exception was intended—even when a foreign government is one of the sources of information about foreign law. To the contrary, as the Rules Advisory Committee explained, Rule 44.1 provides that "the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966. By authorizing U.S. courts to consider any relevant material or source, Rule 44.1 helps ensure that U.S. courts have the flexibility to obtain the information they need to determine foreign law accurately. *See infra* Part I.B; Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (noting that "the rule provides flexible procedures for presenting and utilizing material on issues of foreign

law by which a sound result can be achieved with fairness to the parties").

The Second Circuit's "bound-to-defer" rule would limit the authority that Rule 44.1 grants to the courts. By making foreign government statements binding, the Second Circuit's rule would not allow U.S. courts to "consider any relevant material or source" when determining foreign law. Instead, whenever a foreign government makes statements about its law that are "reasonable under the circumstances," U.S. courts would be required to determine foreign law according to those statements—regardless of the reliability of those statements, and regardless of other reliable and persuasive information that might compel a different determination. For example, the "bound-to-defer" rule would prevent a U.S. court from considering foreign legislative records or foreign judicial decisions that might undermine or provide perspective for the interpretation proffered by a foreign executive agency. Thus, the Second Circuit's rule would effectively amend Rule 44.1 by creating an exception to Rule 44.1's broad authorization in cases in which foreign governments provide information about foreign law. Any amendment to Rule 44.1 should be made pursuant to the federal rulemaking process. *See* 28 U.S.C. §§ 2072 *et seq.*

The Second Circuit attempts to avoid this conclusion by reasoning that "Rule 44.1 explicitly focuses on ***what*** a court may consider when determining foreign law, but is silent as to ***how*** a court should analyze the relevant material or sources. Thus, courts must still evaluate the relevant

source material within the context of each case." *In re Vitamin C*, 837 F.3d at 187. But this reasoning cannot be reconciled with the "bound-to-defer" rule. If a foreign government's statements were binding on a U.S. court, consideration of other material would be meaningless, for it would not be allowed to influence the court's determination, even if that material is highly accurate and reliable. Rule 44.1, after all, calls for courts to "consider" relevant sources. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003) (defining consider as "to think about carefully" as in "to think of esp. with regard to taking some action" or "to take into account"); WEBSTER'S COLLEGIATE DICTIONARY (5th ed. 1948) (defining consider as "to think on with care"). At most, the Second Circuit's rule would allow U.S. courts to consider other material for the narrow purpose of determining whether a foreign government's interpretation is "reasonable under the circumstances presented"—but even with this qualification, the "bound-to-defer" rule would not allow courts to "consider *any* relevant material or source" for the fundamental purpose of determining foreign law accurately, as Rule 44.1 authorizes (emphasis added).

To support its "bound-to-defer" rule, the Second Circuit relies on *United States v. Pink*, 315 U.S. 203 (1942). This reliance is misplaced. Most importantly, for the reasons just given, the Second Circuit's reading of *Pink* as stating a "bound-to-defer" rule is inconsistent with Federal Rule of Civil Procedure 44.1, which entered into effect in 1966, more than 20 years after *Pink* was decided.

The Second Circuit discounts the impact of Rule 44.1. *See In re Vitamin C*, 837 F.3d at 188 ("Rule 44.1 does not alter the legal standards by which courts analyze foreign law . . . ."). But by doing so it ignores the important consequences of Rule 44.1's adoption. As Wright and Miller explain: "The procedure for proving foreign law was changed substantially by . . . Rule 44.1. . . . Thus, the trial court's freedom of inquiry no longer is encumbered by any restraint on its research or by the rules of admissibility . . . . Since the rule dissipates former inhibitions on judicial inquiry, the district judge may consider any material the parties wish to present." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.). Rule 44.1 also abandoned the treatment of foreign law issues as issues of fact, and established that a determination of foreign law instead "must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("[T]he court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact'. . . .").

Moreover, *Pink* was an appeal from a New York state court, and both the state court and this Court applied New York state law to determine the content of foreign law in that case. *See* 315 U.S. at 217-22 (discussing New York Civil Practice Act § 391 and its requirement to treat certain "written authorities" as "presumptive evidence" of foreign law); *see also* Fed. R. Civ. P. 43(a) (calling for district courts, at the time of *Pink*, to apply state evidence law in some circumstances). One purpose of Federal Rule 44.1—and of the Federal Rules more

generally—was to provide a uniform federal approach to questions of procedure, including the determination of foreign law. The first sentence of the Advisory Committee Notes accompanying the first version of Rule 44.1 stated: "Rule 44.1 is added by amendment to furnish Federal courts with a *uniform* and effective procedure for raising and determining an issue concerning the law of a foreign country." Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (emphasis added). The Notes further explained that the authorization to "consider any relevant material or source" was explicitly designed to end the reliance on variable and often undesirable state laws. *See id.*[2] For reasons we explain shortly, we see no conflict between *Pink* and Rule 44.1. But even if there were a conflict, Rule 44.1 would control today.

Furthermore, it is far from clear that *Pink* stands for the general proposition that U.S. courts are "bound to defer" to foreign government statements. Although this Court in *Pink* found a declaration of the Russian Commissariat for Justice

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[2] Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43.") (citation omitted).

interpreting Russian law to be conclusive *in the particular circumstances presented*, this Court announced no rule in *Pink* requiring that foreign government statements be binding on U.S. courts *in general*. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 11 ("This Court's holding [in *Pink*] that the Commissariat's declaration was 'conclusive' under those circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.").

Even if *Pink* is read as stating a general rule of deference—which it does not—it may be read as a *conditional* deference rule—not a categorical rule as suggested by the Second Circuit. *See Pink*, 315 U.S. at 220 (explaining that, prior to treating the declaration as conclusive, this Court determined that "the evidence supported [the] finding[] that the Commissariat for Justice has power to interpret existing Russian law"); *id.* at 218 (explaining that, although this Court "[did] not stop to review all the evidence in the voluminous record" on the question of Russian law, it accepted the stated interpretation only after observing "that the expert testimony tendered by the United States gave great credence to its position"). Thus, *Pink* arguably stands only for the proposition that courts *may* treat foreign government statements about foreign law as conclusive *if* evidence shows that the foreign government agency making the statement is authorized to interpret foreign law *and* there are other persuasive sources or materials that are consistent with that interpretation.

B. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH THE PRINCIPLE THAT U.S. COURTS SHOULD ACCURATELY DETERMINE FOREIGN LAW.

A basic principle governing the determination of foreign law under Rule 44.1 is that courts should determine foreign law accurately. *See Rationis Enterprises Inc. v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 586 (2d Cir. 2005) ("Ultimately, the responsibility for correctly identifying and applying foreign law rests with the court."); *see also* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 728 (1967) ("Rule 44.1 expresses a philosophy that federal courts should ascertain foreign law accurately whenever possible."). The accurate determination of foreign law requires that it be considered in light of how it is authoritatively interpreted and applied in the foreign country. *See de Fontbrune v. Wofsy*, 838 F.3d 992, 994, 1003 (9th Cir. 2016) (noting that the issue of French law governing remedy was "not a simple matter of translation" but "requires a broader look at French law to understand the nature of the . . . remedy" and how it functions in France, including an inquiry into how the remedy is actually used in the French legal system); *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010) (Wood, J., concurring) (arguing that court's understanding of foreign law should not be merely "theoretical" but instead should take into account "day-to-day realities of the practice of law" in the foreign state). The approach of the Second Circuit

effectively reverts to treating foreign law as a question of fact in which a foreign government's statement is accepted as "truth," ignoring Rule 44.1's directive to weigh the available information. *See Madanes v. Madanes*, 186 F.R.D. 279, 283 (S.D.N.Y. 1999) ("Since foreign law is an issue of law rather than of fact, it is not the credibility of the experts that is at stake, but rather the persuasiveness of their opinions.").

The principle of accuracy implies that a court must consider information about foreign law based on how reliable and persuasive the information is. *See Bodum*, 621 F.3d at 628 (majority opinion) ("Judges should use the best of the available sources."); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444 (3d ed.) ("[O]ne of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials. To effectuate this policy, the court is obliged to take an active role in the process of ascertaining foreign law.").

Reliable and persuasive information may, of course, come from a foreign government. But being a foreign government agency or official is not by itself a sufficient indicator of reliability and persuasiveness, because the reliability and persuasiveness of foreign government statements depend on many other factors. These include: (1) whether the specific agent of the foreign government making the statement about foreign law is authorized to officially interpret that law; (2)

whether the statement is consistent with the same agent's earlier statements; (3) whether the statement is consistent with those made by other agents of the foreign government; (4) whether the statement is consistent with how the foreign government's courts have interpreted that law; (5) whether the statement is consistent with information about that foreign law from other reliable sources; (6) how well-supported the statement is by primary sources of foreign law; (7) how well-reasoned the statement is; (8) the context and purpose of the statement; and (9) whether the statement will be binding in any future proceedings in the foreign state or in a U.S. court. *See* Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 8 ("The precise weight to be given to a foreign government's statement turns on factors including the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence.").

Foreign court decisions are generally likely to be more reliable and persuasive sources of information about foreign law than information provided to U.S. courts by executive agencies of foreign governments in the context of pending U.S. litigation—but U.S. courts are not "bound to defer" to foreign court decisions, either.[3]

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[3] Although the conflict-of-laws rules governing foreign judgments ordinarily provide that U.S. courts should generally recognize and enforce those judgments, there are numerous

The pitfalls of relying on a statement about foreign law solely because it is provided by a foreign government agency are illustrated in *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003). In that case, defendant was convicted of violating the Lacey Act, which is a U.S. statute that prohibits the importation of "fish or wildlife [that has been] taken, possessed, transported, or sold in violation of . . . any foreign law." *Id.* at 1232 (quoting 16 U.S.C. § 3372(a)(2)(A)). Defendant's conviction was based on a violation of Honduran law. *Id.* at 1232-34. The district court relied on statements of multiple Honduran officials, including a legal officer of a Honduran government ministry made during the investigation and trial, that the relevant law was valid. *Id.* at 1234-35. But after defendant's conviction, the Embassy of Honduras filed an *amicus* brief in support of defendants, arguing that the law "was of no force and effect, because it was not adopted in accordance with Honduran law and thus it could not legally provide the basis for any violation of Honduran law." Brief Amicus Curiae of the Embassy of Honduras and the Asociacion de Pescadores del Caribe in Support of Defendant-Appellant David Henson McNab, 2002 WL 32595268, at *13. The Court of Appeals for the Eleventh Circuit held that it would not defer to the new Honduran position. *McNab*, 331 F.3d at 1242. The Eleventh Circuit insisted that "[w]e must have

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grounds for refusing recognition and enforcement. *See, e.g.*, Uniform Foreign-Country Money Judgments Recognition Act § 4, available at http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf.

consistency and reliability from foreign governments with respect to the validity of their laws." *Id.*

A fundamental flaw of the Second Circuit's "bound-to-defer" rule is that it would prevent courts from independently weighing information about foreign law in accordance with these and other available indicia of reliability and persuasiveness. The Second Circuit's rule would require courts to determine foreign law in accordance with a foreign government's statements even if those statements have a lower degree of reliability or persuasiveness than other information before the court. Indicia of reliability and persuasiveness would only matter if they so clearly tilted against a foreign government's statements as to render them not "reasonable under the circumstances." *In re Vitamin C,* 837 F.3d at 189. The principle behind the determination of foreign law, however, is to arrive at an accurate determination, not merely a reasonable one.

This flaw is especially serious at the appellate level. As the Second Circuit correctly observed, "[t]he determination of foreign law is 'a question of law, which is subject to *de novo* review.'" *Id.* at 183. A primary purpose of de novo review is to ensure that an appellate court can correct a district court's inaccurate determination of the content or meaning of foreign law. *See McKesson Corp. v. Islamic Republic of Iran,* 753 F.3d 239, 242 (D.C. Cir. 2014) (undertaking "de novo review of the district court's *interpretation* of foreign law") (emphasis added); *Iracheta v. Holder,* 730 F.3d 419, 423 (5th Cir. 2013) ("Just like any question of law, '[t]he *content* of foreign law is a question of law and is subject to de

novo review.'") (quoting *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.1999)) (emphasis added); *see also* Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 ("[T]he court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a)."); John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 6 n.12 (1983) ("[A]ssurance of the correctness of the content and application of foreign law requires the supervision of appellate review."). Yet the Second Circuit's review was based more on deference than accuracy. As the Second Circuit itself states: "[I]f the Chinese Government had not appeared in this litigation, the district court's careful and thorough treatment of the evidence before it in analyzing what Chinese law required . . . would have been entirely appropriate." *In re Vitamin C*, 837 F.3d at 191 n.10.

C. THE SECOND CIRCUIT'S RULE VIOLATES THE PRINCIPLE OF JUDICIAL INDEPENDENCE IN THE DETERMINATION OF FOREIGN LAW.

The bedrock principle of judicial independence applies to all determinations of law by U.S. courts, including determinations of foreign law. *See Garcia v. Pinelo*, 808 F.3d 1158, 1163 (7th Cir. 2015) ("'[I]n determining these questions of [foreign] law, both trial and appellate courts are urged to research and analyze foreign law independently.' This is because

'one of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full evaluation of the available materials.'") (citations omitted); *de Fontbrune v. Wofsy*, 838 F.3d 992, 997 (9th Cir. 2016) (stressing "the district court's independent obligation to adequately ascertain relevant foreign law"); *PNC Financial Services Group, Inc. v. C.I.R.*, 503 F.3d 119, 126 (D.C. Cir. 2007) ("[Rule 44.1] direct[s] courts to independently determine issues of foreign law.").

The principle of independence means that a U.S. court cannot be required to defer to information given to it by others, but may instead engage in its own independent research on foreign law. *See Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002) ("'[F]ederal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.'") (quoting *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999)); Fed. R. Civ. P. 44.1, Notes of Advisory Committee on Rules—1966 (noting that under Rule 44.1 the court "may engage in its own research and consider any relevant material thus found"); *see also Products and Ventures International v. Axus Stationary (Shanghai) Ltd.*, 2017 WL 201703, at *3 (N.D. Cal. Jan. 18, 2017) ("[A] district court has an 'independent obligation' to ascertain the relevant foreign law. . . . Thus, courts must . . . determine whether submissions from parties are sufficiently reliable."); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, 9A FED. PRAC. & PROC. CIV. § 2444

(3d ed.) ("[F]ederal courts have not felt bound by the testimony of foreign law experts and upon occasion have placed little or no credence in their opinions when not supported adequately or when the views were offered in too partisan a fashion."); *cf. Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (characterizing European Commission as a "tribunal" despite an amicus brief from the European Commission arguing that under European Union law the European Commission did not function as a tribunal).

The Second Circuit's "bound-to-defer" rule violates the principle of judicial independence in two ways. First, it would impose on U.S. courts a particular interpretation of foreign law—that of an appearing foreign government—rather than allowing U.S. courts to determine foreign law independently based on indicia of reliability and persuasiveness such as those discussed above. Second, the "bound-to-defer" rule would render meaningless the authority Rule 44.1 gives courts to do independent research on foreign law. The Second Circuit's "bound-to-defer" rule thus would be just the sort of "judge-made doctrine for the abdication of the judicial duty" to interpret law that has raised concerns in other contexts. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J.). In this case, the bound-to-defer rule would require adopting the Chinese ministry's statement even though the trial court found that "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position." *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546, 557 (E.D.N.Y. 2008).

II. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FOREIGN AND INTERNATIONAL PRACTICE.

The Second Circuit's bound-to-defer standard is inconsistent not only with basic American conflict-of-laws principles, but also with foreign and international practice. Foreign courts are not subjected to the "bound-to-defer" rule that the Second Circuit would impose on U.S. courts, and treaties on the determination of foreign law show that foreign governments do not expect that sort of deference from each other. Indeed, the fundamental principles of accuracy and independence in the determination of foreign law that underpin Rule 44.1 are widely recognized in foreign and international practice.

A. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH FOREIGN PRACTICE.

The Second Circuit's bound-to-defer rule would impose a more rigid rule of deference on U.S. courts than foreign countries impose on their own courts. As the United States has stated in this litigation, the Department of Justice "is not aware of any foreign-court decision holding that the Department's representations are entitled to such conclusive weight." Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 11-12.

The United States' assessment is consistent with a recent study of how 34 nations in Europe,

North and South America, the Asia-Pacific Area, and Africa treat foreign law, which found that the large majority of these nations do not require their courts to be bound by information about foreign law. *See* Yuko Nishitani, *Treatment of Foreign Law: Dynamics Towards Convergence?—General Report, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 26 (Yuko Nishitani ed., 2017) ("Information obtained with respect to foreign law is not binding in most jurisdictions. . . . The judge needs to examine the quality of the obtained information in court proceedings, possibly by using additional materials. In light of this, it is sensible policy to exclude the binding force of any information provided in relation to foreign law."); *id.* at 30 ("The effects of the information on foreign law provided by expert witnesses, documents submitted by the parties or any other means is not binding on the judge."); *see also* Maarit Jänterä-Jareborg, *Foreign Law in National Courts: A Comparative Perspective*, 304 RECUEIL DES COURS 281, 287 (2003) (surveying Germany, France, England, Sweden, Norway, Finland, Denmark, Italy, Austria, Switzerland, and a variety of Latin American countries, and concluding that in those jurisdictions "the court is not bound by the information or 'evidence' [regarding foreign law] delivered by the parties, but remains free to assess its reliability and sufficiency"). For example:

- In Germany, "[t]he provided legal information never is binding on the court. Rather, the court retains its responsibility under [the German Code of Civil Procedure] and has to evaluate

the information rendered." Oliver Remien, *Germany: Proof of and Information About Foreign Law–Duty to Investigate, Expert Opinions and a Proposal for Europe*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 183, 203 (Yuko Nishitani ed., 2017).[4]

- In France, a statement about foreign law "is subject to adversarial debate and it is not binding upon the judge who has to verify, among other things, the impartiality" of the statement. Sabine Corneloup, *France–The Evolving Balance Between the Judge and the Parties in France*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 157, 171 (Yuko Nishitani ed., 2017).[5]

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[4] *See* Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 293, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89715/103136/F-842321361/ZPO.pdf, translation at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html ("The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to us other sources of reference as well, and to issue the required orders for such use.").

[5] *See* Code de procédure civile, art. 246, https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=8B6C6B1B7107BAED721D0D2D0500A511.tplgfr27s_1?idArticl

- Spanish law provides that "[n]o report or opinion, national or international, on foreign law, shall be binding for Spanish courts." Carmen Azcárraga Monzonís, *Spain: The Application of Foreign Laws in Spain–Critical Analysis of the Legal Novelties of 2015, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 329, 333 (Yuko Nishitani ed., 2017).[6]

- In Switzerland, "[l]egal information on foreign laws is not binding on Swiss judicial authorities." Ilaria Pretelli & Shaheeza Lalani, *Switzerland: The Principle Iura Aliena Novit Curia and the Role of Foreign Law Advisory Services in Swiss Judicial Practice, in* TREATMENT OF FOREIGN LAW: DYNAMICS

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e=LEGIARTI000006410377&cidTexte=LEGITEXT000006070716&dateTexte=20050514, translation at https://www.legifrance.gouv.fr/content/download/1962/13735/.../Code_39.pdf ("The judge is not bound by the findings or conclusions of the expert.").

[6] *See* Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil, BOE-A-2015-8564, art. 33.4, http://www.boe.es/buscar/doc.php?id=BOE-A-2015-8564, translation in Carmen Azcárraga Monzonís, *Spain: The Application of Foreign Laws in Spain–Critical Analysis of the Legal Novelties of 2015, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 329, 333 (Yuko Nishitani ed., 2017) ("No report or opinion, national or international, on foreign law, shall be binding for Spanish courts.").

TOWARDS CONVERGENCE? 375, 390 (Yuko Nishitani ed., 2017).[7]

- In Japan, "[t]he legal information provided is not binding upon the judicial authorities. Instead, they are obliged to investigate and assess the reliability of the information submitted ex officio." Shunichiro Nakano, *Japan: Proof of and Information About Foreign Law in Japan*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 529, 533 (Yuko Nishitani ed., 2017).

B. THE SECOND CIRCUIT'S RULE IS INCONSISTENT WITH INTERNATIONAL PRACTICE.

The Second Circuit's "bound-to-defer" rule is also inconsistent with the world's two most important international treaties on the interpretation of foreign law: the European Convention on Information on Foreign Law, June 7, 1968, 720 U.N.T.S. 154, which has 46 parties,[8] and the Inter-American Convention on Proof of and Information on Foreign Law, May 8, 1979, 1439

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[7] *See* Schweizerische Zivilprozessordnung [ZPO], [Civil Procedure Code] Dec. 19, 2008, SR 272, art. 157, translation at https://www.admin.ch/opc/en/classified-compilation/20061121/index.html ("The court forms its opinion based on its free assessment of evidence taken.").

[8] *See* Chart of Signatures and Ratifications of Treaty, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/062/signatures?p_auth=GlHMAlNF.

U.N.T.S. 111, which has 12 parties.[9] Both treaties allow the courts of a party to request information about foreign law from a designated foreign government official. But even when there is a formal request and foreign government reply in accordance with the treaty process, a court is not bound to defer to the foreign authority's reply. European Convention, art. 8 ("The information given in the reply shall not bind the judicial authority from which the request emanated."); Inter-American Convention, art. 6 ("[Parties] shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received."). These treaties "confirm that the court of appeals' rule is out of step with international practice." Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari at 12 n.2.

These treaties show that foreign countries do not expect each other's courts to be bound to defer. To the contrary, these foreign countries are concerned that a binding approach would violate the principle that courts should independently determine foreign law. As the official Explanatory Report on the European Convention explains, the rule providing that foreign government statements are not binding "was inserted in order to stress the desire of the Convention to respect the courts' independence." Council of Europe, Explanatory Report to the European Convention on Information on Foreign Law, June 7, 1968, at 6, available at https://rm.coe.int/16800c92f3. *See also* Yuko

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[9] *See* General Information of the Treaty, https://www.oas.org/juridico/english/sigs/b-43.html.

Nishitani, *Treatment of Foreign Law: Dynamics Towards Convergence?—General Report*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 56 (Yuko Nishitani ed., 2017) ("[T]he large majority of national reporters argue that the reply should not be binding upon the judge . . . , although this is not a unanimous view. . . . [T]he reply ought to remain non-binding to allow the judge to examine the reliability and accuracy of the provided information and, if it is imprecise or incorrect, conduct further research into the content of foreign law by referring to other sources.").

The United States is not a party to either of these treaties. However, the United States has officially expressed its view to the Hague Conference on Private International Law that any future convention on foreign law should likewise provide that the views of foreign government authorities are not binding on receiving courts. *See* Response of the United States of America to Feasibility Study on the Treatment of Foreign Law Questionnaire, Prel. Doc. No 25 (Oct. 2007), Response to Question 29(c) (answering "YES" to the following question: "Should the information received be non-binding (as opposed to binding)?"), available at https://assets.hcch.net/upload/wop/genaff_pd09us.pdf .

III. DEFERENCE PRINCIPLES SHOULD NOT BE PART OF THE DETERMINATION OF FOREIGN LAW.

A rule requiring deference to foreign government statements about foreign law would not

only undermine the accuracy and independence of U.S. legal judgments, but also have the effect of delegating to foreign governments power to influence the application of domestic law—and hence the implementation of domestic policy—in a wide range of cases in which the proper application of U.S. law depends on the determination of foreign law. Moreover, international comity does not require that U.S. courts be bound to defer to foreign government statements about foreign law. While the ordinary Rule 44.1 approach to issues of foreign law is unlikely to raise comity concerns, a "bound-to-defer" approach may raise such concerns.

A. A RULE REQUIRING DEFERENCE IS INAPPROPRIATE BECAUSE IT WOULD ALLOW FOREIGN GOVERNMENTS TO UNDULY INFLUENCE THE APPLICATION OF U.S. LAW.

The proper application of American law frequently depends on the determination of foreign law. For example, foreign law determines whether foreign corporations have the capacity to sue and be sued in U.S. courts; defendants in breach of contract cases may plead a defense of supervening foreign illegality; domestic statutes may create liability for conduct in violation of foreign law; the protection against self-incrimination may apply to potential foreign prosecutions; courts manage civil discovery in light of foreign laws that affect potential compliance; extraterritorial service of process in federal court is permissible as prescribed by the foreign country's law; foreign laws may be relevant

to venue questions in U.S. courts; laws creating exceptions for double taxation require an assessment of whether foreign tax liability attaches; resolution of various types of disputes requires determination of the validity of a foreign marriage; and—as in this case—foreign law determines whether a party can successfully raise the defense of foreign sovereign compulsion. *See* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 15-17 (2016) (collecting sources and other examples); *see also The Amistad*, 40 U.S. 518, 520, 593-97 (1841) (Story, J.) (applying this Court's independent interpretation of Spanish law to free captured slaves and to reject as evidence of their ownership the "public documents of the [Spanish] government" that accompanied the vessel).

In these situations the determination of foreign law fundamentally influences the application of *domestic* law and hence the implementation of *domestic* policy. It is therefore crucial that U.S. courts retain the authority to independently determine foreign law in these cases.

The Second Circuit's "bound-to-defer" rule would inappropriately delegate this authority from U.S. courts to foreign government actors by requiring that U.S. courts defer to the determinations of foreign government actors appearing in U.S. court and by barring U.S. courts from independently determining foreign law as they are authorized to do under Rule 44.1. This delegation would allow foreign governments to influence the application of American law in a wide range of cases—even though foreign governments

lack the same interest as U.S. courts in ensuring the proper application of American law. The Second Circuit's "bound-to-defer" rule would have this effect whenever the application of American law depends on the determination of foreign law and a foreign government decides to submit an official statement interpreting that law. For example, the Second Circuit's rule would seem to permit a foreign government to intervene in any case against a foreign corporation and conclusively declare that corporation not capable of being sued in a U.S. court. *See* Fed. R. Civ. P. 17(b)(2) ("Capacity to sue or be sued is determined . . . for a corporation, by the law under which it was organized . . . ."). *See also United States v. McNab*, 331 F.3d 1228, 1242 (11th Cir. 2003) ("[I]t is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law serving as the basis for his conviction in the United States. . . .There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.").

In the antitrust setting, there are special reasons for U.S. courts to determine foreign law independently—and not simply defer to foreign government statements about foreign law. In some cases, statements may be submitted "to shield the foreign defendants from liability in the U.S., even if their conduct was anticompetitive." Marek Martyniszyn, *Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases*, 61 ANTITRUST

BULL. 611, 630 (2016). It is neither surprising, nor is it disrespectful to foreign governments, to acknowledge that they, like the United States, will occasionally take litigation positions abroad to promote the interests of their nationals. *See id.* at 641 (observing the possibility that "a [foreign] state participates as amicus before a U.S. court to meet expectations of some local constituencies or lobbying groups"); *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522, 552 (E.D.N.Y. 2011) (finding that Chinese ministry's statement "does not read like a frank and straightforward explanation of Chinese law. Rather, it reads like a carefully crafted and phrased litigation position. . . . [A]ll of the points above suggest that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law. . . ."); *see also infra* Part III.B (discussing situations in which U.S. courts assess the motives of foreign governments).

This is not to suggest that foreign government statements that are consistent with or motivated by foreign governmental interests, or the interests of foreign businesses, are submitted in bad faith. It merely means that judicial reliance on these statements will not necessarily further the principle of accuracy and could, in some cases, interfere with U.S. law and policy.

B. INTERNATIONAL COMITY DOES NOT REQUIRE DEFERENCE TO A FOREIGN GOVERNMENT'S STATEMENT ABOUT FOREIGN LAW.

Respondent seems to suggest that the Second Circuit's "bound-to-defer" rule is necessary as a matter of international comity to ensure that U.S. courts give "proper respect" to the sovereignty of foreign countries. *See* Brief in Opposition at 26, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., No. 16-1220 (U.S. June 5, 2017). This is incorrect. International comity does not require deference to a foreign government's statement about foreign law.[10]

To be sure, international comity is one traditional rationale for *choice-of-law rules* that call for the *application* of foreign law as a rule of decision under specified circumstances. *See Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of one [country], will, by the comity of nations, be recognised and executed in another . . . ."); JOSEPH

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[10] In other contexts, comity concerns have not prevented this Court from critically characterizing and rejecting foreign government positions in litigation. *See RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2108 (2016) ("refus[ing] to adopt" the position of the European Community and its member states, and referring to the position as a "double standard"); *see also* Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653, 678 et seq. (2016) (discussing numerous other cases in which U.S. courts rejected claims of foreign sovereigns instead of deferring based on comity doctrine).

STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (2d ed. 1841) (1834) ("[The] comity of nations . . . is the most appropriate phrase to express the true foundation and extent of the laws of one nation within the territories of another.").

But this case is different. This case involves the *interpretation* of foreign law, not its application as a rule of decision. And foreign law is at issue because the proper application of domestic law—namely U.S. antitrust law and possible U.S.-law defenses to its application—depends on the determination of foreign law, *not* because choice-of-law rules require foreign law to be applied. *See supra* Part III.A.[11] Therefore, this case does not implicate the international comity rationale underlying choice-of-law rules.

In addition, the concerns that animate the rules governing the determination of foreign law are fundamentally different than those that animate comity doctrines. The former are concerned with ensuring that U.S. courts independently and accurately determine the content of foreign law, whereas the latter are concerned with the respect

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[11] Even in the choice-of-law context, international comity does not *require* deference. It is well established, for example, that a court may decline to apply foreign law that is "contrary to the strong public policy of the forum." Restatement (Second) of Conflict of Laws § 90 (Am. Law Inst. 1971); *see also* STORY, *supra*, § 25, at 31 ("No nation can . . . be required to sacrifice its own interests in favor of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard for justice and duty.").

owed between governments. *See supra* Part I. Comity considerations should therefore be kept separate from Rule 44.1 and other principles governing the determination of foreign law.

To the extent that this Court is concerned about protecting international comity, nothing in Rule 44.1 undermines other doctrines that protect comity interests directly. There are many "international comity doctrines" that apply in U.S. courts, including the act of state doctrine, presumption against extraterritoriality, foreign state compulsion, recognition of foreign judgments, forum non conveniens, international comity abstention, antisuit injunctions, foreign discovery, foreign sovereign immunity, foreign official immunity, and the right of foreign governments to bring suits in U.S. courts. *See generally* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015). These doctrines are distinct from the question before the Court in this case.[12]

In any event, because the Second Circuit's "bound-to-defer" rule is inconsistent with foreign and international practice, *see supra* Part II, it is unlikely that a foreign government could genuinely view a U.S. court's respectful but independent

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[12] Because the Second Circuit did not rule on Respondent's act of state doctrine and foreign sovereign compulsion defenses, and because this Court decided not to review the Second Circuit's decision to abstain on grounds of international comity, this Court should address only how foreign law should be determined and should not address how any of the international comity doctrines potentially implicated in this case should be applied.

determination of foreign law as a violation of principles of international comity.

More specifically, Respondent suggests that the Second Circuit's "bound-to-defer" rule is necessary to prevent U.S. courts from causing offense to foreign governments by speculating about foreign government motives. *See, e.g.*, Brief in Opposition at 26, Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., No. 16-1220 (U.S. June 5, 2017) ("The district court's speculation about the Chinese government's motives illustrate the problem.").

But there is nothing sacrosanct about government motives. *See* Clopton, *supra*, at 10-23 (collecting examples of U.S. courts sitting in judgment of foreign governments, foreign laws, foreign legal acts, foreign legal systems, and foreign government interests). For example, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), this Court held that dismissal of a suit under the act of state doctrine was improper, thus allowing the suit to proceed despite the District Court's finding that the suit could "impugn or question the nobility of a foreign nation's motivations." *Id.* at 408-10. Moreover, in suits against foreign governments under the Foreign Sovereign Immunities Act, U.S. courts may assess the legal liability of foreign governments, which, depending on the elements of the claim, may require courts to make findings about the purpose or intent of foreign government actions. Similarly, the possibility that determinations of foreign law may in some cases touch on foreign government motives

should not interfere with U.S. courts' ability to make those determinations accurately and independently.

Indeed, requiring courts to defer to foreign government interpretations may put undue pressure on courts to rely on other comity doctrines. A court faced with a potentially unreliable foreign government statement should be able to independently evaluate the statement's persuasiveness and then to explain honestly the basis of that independent evaluation. If a court were bound to defer to an unreliable statement, as the Second Circuit's rule would require, then there is a risk that the court would be tempted to invoke abstention-like options that might not otherwise be appropriate. *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (describing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

C. THE SECOND CIRCUIT'S "BOUND-TO-DEFER" APPROACH RAISES COMPLEX QUESTIONS OF FOREIGN LAW THAT MIGHT THEMSELVES RAISE INTERNATIONAL COMITY CONCERNS.

Directing U.S. courts to defer to foreign government determinations of law sounds simple, but in fact this approach would raise challenging questions and would risk offense to international comity, thus undermining its chief justification.

A rule that requires deference to certain foreign government statements implies that courts would have to decide which foreign statements receive this treatment. For example, U.S. courts would presumably have to determine which foreign government institutions are permitted to make authoritative statements about foreign law.[13] This determination likely would require government-by-government assessments, and may vary depending on the allocation of authority within each country (*e.g.*, parliamentary versus presidential versus nondemocratic). The choice also could depend on whether the foreign law in question is judge-made law, legislation, executive order or decree, or administrative regulation. Courts would have to decide how to respond if the foreign government experienced a change in position (or leadership) between the underlying conduct and the litigation, or if two branches of a foreign government submitted conflicting determinations. And at least in some circumstances, the Second Circuit suggests that the "reasonableness" of foreign government statements may still be scrutinized. *See In re Vitamin C*, 837 F.3d at 189.

Asking courts to make these determinations is at least as likely to raise international comity concerns as the existing Rule 44.1 approach. Because the Second Circuit's "bound-to-defer" rule is inconsistent with foreign and international practice,

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[13] In many cases, this authority might be sensibly assumed when the foreign government entity is a foreign country's highest court; but the inquiry may be far more complex when foreign government entities other than courts are involved.

it is unlikely that a foreign government could genuinely view a U.S. court's respectful but independent determination of foreign law in accordance with Rule 44.1 as a violation of principles of international comity. *See supra* Part II. But under the Second Circuit's approach, foreign governments could be offended when U.S. courts categorize some of their government actors as authoritative and others not, and some of their statements "reasonable under the circumstances" and others not.

IV. U.S. COURTS SHOULD GIVE RESPECTFUL CONSIDERATION TO A FOREIGN GOVERNMENT'S STATEMENT ABOUT FOREIGN LAW, BUT THEY STILL MUST DETERMINE FOREIGN LAW INDEPENDENTLY.

U.S. courts should give respectful consideration to a foreign government's statements about its law. *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 92 (2015) ("[O]ur Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices."); *cf. Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006) (noting that the International Court of Justice's interpretation of a treaty "deserves 'respectful consideration,'" but declining to be bound by that interpretation) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)). This respectful consideration is consistent with the principles of judicial independence and accuracy that underpin the determination of foreign law under Rule 44.1.

Indeed, in some cases U.S. courts may find it helpful to actively seek information about foreign law from a foreign government. Efforts to clarify the process for foreign government participation in U.S. litigation should be pursued, and such participation should be encouraged. *See, e.g.*, Communication to Courts, 1978 Digest of United States Practice in International Law ch. 4, § 1 at 560-63 (describing this Court's efforts to encourage foreign governments to directly file amicus briefs rather than communicating to U.S. courts through the State Department). Efforts to formalize inter-court relationships seem especially promising. *See, e.g.*, 11 U.S.C. § 1525 (providing for court-to-court communication in cross-border bankruptcy cases); Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (Feb. 2, 2017), available at http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.aspx (providing for cooperation between New York state courts and the courts of New South Wales in resolution of questions of the other's law); *see also Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1974) (praising the use of the formal certified-question procedure in domestic interjurisdictional cases).

But a foreign government's statements cannot be binding on U.S. courts. Instead, U.S. courts should accurately and independently determine the meaning of foreign law taking into account not only a foreign government's own statements, but also other relevant information about that law, as

expressly authorized by Rule 44.1. This independent approach is especially important when—as in this case and many other cases—the proper application of American law depends on the determination of foreign law. *Cf.* BREYER, *supra,* at 7 ("I do not ignore the basic fact that the American people can and must democratically determine their own laws."). Just as U.S. courts should respectfully consider foreign government statements, foreign governments should respect the independence of U.S. courts when ruling on questions of law.

The Second Circuit's "bound-to-defer" rule is unnecessary to promote the respectful consideration of foreign government statements about foreign law. Rule 44.1—which already authorizes the consideration of "any relevant material or source"—and the principle of accuracy in the determination of foreign law, already ensure this. This case requires no more than reaffirming those basic principles.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[14] Several *amici* are reporters or advisers for restatement and other projects of the American Law Institute, including the Restatement (Third) of Conflict of Laws and the Restatement (Fourth) of Foreign Relations Law. They join this brief in their individual capacity. This brief should not be taken to represent the views of the American Law Institute.

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